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Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

UNITED STATES

v.

JANET B. WATLINGTON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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QUESTION PRESENTED

Whether petitioner may be convicted under a District of Columbia statute which the City Council adopted which was enacted in accordance with the unconstitutional one-house veto provisions of the District of Columbia Self-Government and Governmental Reorganization Act.

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	3
CONCLUSION	8
APPENDIX A	1a

TABLE OF AUTHORITIES

Cases: Page

Carter v. Carter Coal Co.,
298 U.S. 238 (1938) 6

Consumer Energy Council v. FERC,
281 U.S. App. D.C. 34, 673 F.2d 234 ..... 5, 6

Gary v. United States,
499 A.2d 815 (D.C. 1985) 3, 5, 7

Immigration and Naturalization Service v. Chadha,
462 U.S. 919 (1983) 3, 4, 5, 6

Moore v. Illinois,
408 U.S. 786 (1972) 8

Pettaway v. United States,
216 F.2d 106 (6th Cir. 1954) 8

Process Gas Consumer Group v. Consumer Energy Counsel of America,
463 U.S. 1216 (1983) 5, 6

United States v. Johnson,
457 U.S. 537 (1981) 5

United States v. Loschiavo,
531 F.2d 659 (2nd Cir. 1976) 5

United States Senate v. FTC,
463 U.S. 1216 (1983) 5

Constitution and Statutes:

U.S. Const.:

Article I, section 7 ..... 2, 4

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JANET B. WATLINGTON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner Janet B. Watlington petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia.

OPINION BELOW

The opinion of the court of appeals (App., *infra,* 1a-5a).

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article I, section 7 of the United States Constitution provides in pertinent part:

> All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.
>
> Every bill which shall have passed the House of Representatives and the Senate, shall before it becomes a law, be presented to the President of the United States. [Article I, § 7, cl. 2]
>
> Every Order, Resolution, or Vote to which the Concurrence of the Senate and the House of Representatives may be necessary . . . shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two thirds of the Senate and House of Representative, according to the Rules and Limitations, prescribed in the Case of a Bill.

STATEMENT

1. Petitioner was indicted by a Federal Grand Jury in a fifteen-count indictment. Included in those charges was Count 13, which alleged a violation of District of Columbia Code §22-3811, the Theft and White Collar Act. This Act was enacted by the District of Columbia City Council pursuant to a delegation of authority from Congress in the Home Rule Act, D.C. Code §§201-295.

2. Petitioner's trial by jury in the United States District Court for the District of Columbia commenced in October, 1984. The jury acquitted petitioner of every count in the indictment except for Count 13.

3. On appeal, petitioner challenged the validity of her conviction under D.C. Code §22-3811, contending that the District of Columbia City Council had no authority to enact that provision because its purported grant of authority, the Home Rule Act, was itself invalid. Petitioner's challenge to the Home Rule Act was based on that Act's provision for a one-house veto, held unconstitutional in *Immigration and Naturalization Service v. Chadha,* 462 U.S. 919 (1983), and petitioner's further contention that the provision for a one-house veto was not severable from the balance of the Home Rule Act.

REASONS FOR GRANTING THE PETITION

It is clear, as the District of Columbia Court of Appeals recognized in *Gary v. United States,* 499 A.2d 815 (D.C. 1985), that this Court's invalidation of the one-house veto in *Immigration and Naturalization Service v. Chadha, supra,* sounded the death knell for the one-house legislative veto, §602(c)(2), of the District of Columbia Home Rule Act. D.C. Code §1-201-295. What follows also from the invalidation of the legislative veto is that the entire Home Rule Act, including its provision enabling the District of Columbia City Council to change the criminal law of the District of Columbia, is invalid because the veto provision is inseparable from the remainder of the Act. Because the Theft and White Collar Crime Act was passed by the D.C. City Council pursuant to this unconstitutional delegation of power, the Act is without effect. Appellant could not, therefore, lawfully be prosecuted under that statute.

1. In *Immigration and Naturalization Service [INS] v. Chadha, supra,* this Court found the one-house veto provision in the Immigration and Naturalization Act to be un-

constitutional because this mechanism violated the bicameralism and presentment requirements of Article I of the Constitution. This Court concluded that the legislative veto provision of the Immigration and Naturalization Act was unconstitutional because Congress' exercise of the veto failed to comply with the "single, finely wrought and exhaustively considered procedure," *Id.* at 9051, set out in the "explicit and unambiguous" provisions of Article I. *Id.* at 955. These provisions, which the Court considered to be "integral parts of the unconstitutional design of the separation of powers," *Id.* at 956, unequivocally require that all legislation, including resolutions, be approved by both Houses of Congress and presented to the President before they become effective. The Court held that Article I requirements apply not only when the Congress considers itself to be legislating, but whenever in fact Congess exercises "the legislative power of the Federal government." *Id.* at 956. By adopting an expansive definition of federal "legislative power" which embraces *any action by the Congress affecting the status of persons outside the legislative branch, Id.* at 952, the Court wrote an opinion as "explicit and unambiguous" as the constitutional provisions it was interpreting. *Id.* at 955.

This Court made clear in both its holding and its analysis in *Chadha* that congressional vetos are legislative enactments subject to Article I. It is equally apparent that Congress' power over the District of Columbia is not one of the four explicit and unambiguous provisions of the Constitution permitting one House to act with the force of law (initiation of impeachment; conduct of impeachment trials; approval of presidential appointments; and ratification of treaties). As the Court in *Chadha* emphasized, when the framers meant to carve out an exception for passing legislation, they did so with unmistakable clarity.

Chadha, supra, 462 U.S. at 955.

If there were any doubt about the breadth of the *Chadha* holding, those doubts were settled within days of *Chadha* by the Court's summary affirmance of two decisions which invalidated legislative vetoes. *Process Gas Consumer Group v. Consumer Energy Counsel of America,* 463 U.S. 1216 (1983); *United States Senate v. FTC,* 4673 U.S. 1216 (1983). The powers reflected in the veto provisions of the District of Columbia Home Rule Act are equally legislative in character, effect and fact.

The District of Columbia Self-Government and Governmental Reorganization Act, D.C. Code §1-201 to 1-295 (1981) ("Home Rule Act") contains two separate legislative veto provisions. That contained in §602(c)(1) provides for veto of certain acts of the District of Columbia Government by Congress' adoption of a concurrent resolution disapproving such an act. §602(c)(2) provides:

> In the case of any such act transmitted by the Chairman with respect to any act codified in Title 22, 23 or 24, only if . . . one House of Congress does not adopt a resolution disapproving such act.

The District of Columbia Court of Appeals, the only court of appeals to decide the issue, held the one house veto in the Home Rule Act to be unconstitutional. *Gary v. United States,* 499 A.2d 815, 819-20 (D.C. 1985).

2. Finding the veto provisions unconstitutional is the first step in determining whether the entire Home Rule Act therefore also is invalid. It must then be determined whether the creators of that power would have allowed the grant of authority to exist absent the restraint. *See INS v. Chadha, supra,* 462 U.S. at 931; *Consumer Energy Council v., FERC,* 281 U.S. App. D.C. 34, 673 F.2d 234, *aff'd*

sub nom. Process Gas Consumer Group v. consumer Energy Counsel of America, supra. In this case, this analysis requires a determination of whether Congress would have granted the City Council the power to alter the District's criminal code without the override provision of the one-house veto contained in §602(c)(2). This test to determine the validity of the remainder of a statute was approved by this Court in *Chadha:*

> Only recently this Court reaffirmed that the invalid portions of a statute are to be severed " '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which are not.' " *Buckley v. Valeo,* 424 U.S. 1, 108 (1976), quoting from Champlin Refining Co. v. Corporation Comm'n. of Okalhoma, 286 U.S. 210, 234 (1932).

426 U.S. at 931-32.

The Home Rule Act has no severability clause to prevent an invalid provision such as §602(c)(2) from infecting the rest of the statute. In *Carter v. Carter Coal Co.,* 298 U.S. 238, 312 (1938), this Court stated that the appropriate analysis to determine the effect of an invalid provision on the remainder of the statute (irrespective of the presence of a severability clause) is "the intent of the lawmakers."

The legislative history of the Home Rule Act clearly shows the intent of the legislators. Unlike the situation in *Chadha* and *Consumer Energy,* where the courts found that there was little debate about the role of Congressional oversight in the passage of the challenged statutes, *see Chadha, supra,* 462 U.S. at 934; *Consumer Energy, supra,* 218 U.S. App. D.C. at 51-53, 673 F.2d at 442-44, it is obvious that Congress, in debating and amending the Home Rule Act, viewed federal retention of power as an essential

condition of any plan to delegate authority over the District's criminal code. The legislative veto was the *quid pro quo* for the delegation of authority over the criminal code to the City Council.

At all stages of the legislative process, Congress was concerned with erecting sufficient safeguards against the possible erosion of the District's security – for example, through a relaxing of the criminal laws or the penalty provisions – following a delegation of authority over the criminal code. Congress' solution was the use of a legislative veto – a measure less extreme than the total prohibition adopted by the House. The legislative veto allowed Congress an efficient, effective, and expeditious method of preventing the Council from enacting any criminal laws which either House of Congress disapproved of. "The veto provision thus became the keystone to the delegation of authority over the criminal code; the restraint and the power becoming so inextricably intertwined that the removal of one would necessarily cause the downfall of the other." *Gary v. United States,* 499 A.2d 815, 848 (Appendix, Opinion of Smith, J.).

3. The panel of the Court of Appeals did not decide the merits of petitioner's claim, holding that the issue was not jurisdictional. Even if the question raised were not jurisdictional, and even if the question were not properly preserved at trial, the Court of Appeals should have decided the merits of appellant's claim under the provisions of F.R.Cr.P. 52(b), which allows appellate review of errors affecting substantial rights of the parties.

Moreover, if the one-house veto provision of the Home Rule Act is inseparable from the remainder of the Act, the statute under which petitioner was convicted was invalid. Because petitioner was not charged with an existing offense, the trial court had no authority to convict or sentence. *United States v. Loschiavo,* 531 F.2d 659, 665-66 (2nd Cir. 1976); *see also United States v. Johnson,* 457

U.S. 537, 550 (where trial court "lacked authority to convict or punish a criminal defendant in the first place," the "judgment or sentence [was] void *ab initio.*"); *see also Moore v. Illinois,* 408 U.S. 786 (1972); *cf. Pettaway v. United States,* 216 F.2d 106 (6th Cir. 1954) (appellant's conviction under law later superceded by a constitutionally valid law not infirm).

4. Because the unconstitutional provision of the legislative veto was the operative condition for Congress' delegation of authority to the Council over criminal laws, the invalidity of the veto provision is fatal to the entire Home Rule Act. And because the Theft and White Collar Act was enacted by the Council pursuant to the authority delegated to it by the Home Rule Act, appellant's conviction under that statute is invalid.

CONCLUSION

Petitioner respectfully suggests that her petition for a writ of certiorari should be granted for the reasons stated above.

Respectfully submitted,

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August 1986

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia, was mailed, postage prepaid, to John D. Duncan, Jr., Esquire, and Jan N. Little, Esquire, U.S. Department of Justice, Public Integrity Section, Criminal Division, P.O. Box 50168, "F" Street Station, Washington, D.C. 20004, on this 20th day of August, 1986.

_____

W. Gary Kohlman

APPENDIX A

NOT TO BE PUBLISHED - SEE LOCAL RULE 8(f)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5942 **September Term, 1985**
Criminal No. 84-00244

United States of America,
Appellee

v.

Janet B. Watlington,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT

Before: SCALIA, STARR and SILBERMAN, *Circuit Judges.*

JUDGMENT

Upon consideration of the record, the briefs and all of the pleadings and proceedings herein, this Court concludes that the issues presented occasion no need for an opinion. *See* Local Rule 13(c). On consideration therof, and for the reasons set forth in the accompanying memorandum it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from is hereby affirmed. It is

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Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

FURTHER ORDERED, by this Court, *sua sponte,* that the Clerk shall withhold of the mandate herein until seven days after disposition of any time petition for rehearing. *See* Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
For the Court

/s/ George A. Fisher
George A. Fisher
Clerk

Janet Watlington appeals her conviction following trial by jury on a count charging theft under D.C. Code §§ 22-3811 and 3812 and referring, by incorporation, to alleged mail fraud under 18 U.S.C. § 22-3811 and 3812 and referring, by incorporation, to alleged mail fraud under 18 U.S.C. § 1341. Appellant presents several arguments on appeal. First, she argues that the statute under which she was convicted is invalid because it was enacted pursuant to the provisions of the Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774 (1973), which provides for a one-House veto that is unconstitutional under *INS v. Chadha,* 462 U.S. 919 (1983). Second, appellant argues that the district court improperly granted the Government's motion to strike surplusage from the indictment. Third, Watlington contends that the district court erred in permitting a Government witness, Leonard Bonnelli, Jr., to offer "expert testimony" and in restricting the scope of cross-examination to prevent defense counsel from inquiring generally about Bonnelli's knowledge of how Louise Hendricks had discharged her duties as a bookkeeper. Fourth, appellant takes issue with the district court's

refusal to strike the testimony of Ursula McBean in light of what the appellant contends was the Government's failure to discharge its responsibilities under *Brady v. Maryland,* 373 U.S. 83 (1063). Finally, Watlington argues that the district court erred in permitting the Government to cross-examine her as to bad acts not charged in the indictment. We address each of these arguments in turn.

We do not reach the merits of appellant's *Chadha* challenge to her conviction. As the Government pointed out in its brief and as appellant's counsel conceded at oral argument, that argument was withdrawn by defense counsel in proceedings before the district court. We do not discern any plain error in the district court's handling of the matter of which we may take notice. Fed. R. Crim.P.52(b).

Appellant's counsel nevertheless urged us at oral argument to address the issue on the ground that it is "jurisdictional." In elaboration, appellant argued that if the Home Rule Act falls *in toto* due to the inseverability of the unconstitutional one-House veto provision, the statute under which Watlington was convicted must also fall. If that statute is invalid, then the effectiveness of the prior criminal statute would be reinstated. The Government, therefore, may have prosecuted Watlington under the wrong statute. Appellant asserts that this would oust the district court's jurisdiction to hear the case.

We do not agree with appellant's characterization of the issue as jurisdictional. Even if the Government did charge Watlington under the wrong statute, that would not necessarily raise an issue relating to the district court's *power* to hear the case. *Cf. United States v. Loschiavo,* 531 F.2d 659, 662-63, 666 (2d Cir. 1976). It would be different if the predecessor statute to the one under which Watlington was convicted accorded exclusive jurisdiction to the D.C. courts in all circumstances, and if there were no other

federal or local statute which made her conduct an offense triable in federal district court but appellant has made no such assertions, nor has our research revealed any tenable basis for such assertions. *See Pettaway v. United States,* 216 F.2d 106, 108 (6th Cir. 1954) (indictment charging acts illegal under existing federal statute not invalid for failure to refer to statute or for specifying wrong statute). We note that the indictment charged a federal offense, over which the federal court undoubtedly would have jurisdiction, as well as offenses under the D.C. Code. We reject the suggestion that every challenge to the constitutionality of a criminal statute gives rise to a jurisdictional issue.

As to appellant's arguments regarding amendment of the indictment, the Government has adequately dispelled any suspicion that five paragraphs are mysteriously missing from Count One of the indictment. We summarily reject appellant's arguments on this point, which seems to us to border on the disingenious.

Regarding appellant's contentions as to the testimony of Mr. Bonnelli, we conclude that although the Government's question regading "degree of care" was somewhat broad, and the trial court's description of Bonnelli as an expert witness inapt (which description the court later corrected), Bonnelli's testimony is properly characterized as a report of his perceptions of the record materials he received — and not, as appellant contends, as a general endorsement of Hendricks' discharge of her duties as a bookkeeper. Under Federal Rule of Evidence 701, such testimony is admissible. We discern no reversible error in the trial court's ruling.

Having concluded that the district court properly characterized the limited scope of Mr. Bonnelli's direct testimony, we also conclude that the district court did not commit reversible error in limiting the scope of cross-

examination commensurately. *See* Fed. R. Evid. 611(b). Contrary to appellant's assertion that she was denied her constitutional right to confront the witness, the court offered defense counsel the opportunity to cross-examine Bonnelli as to what he meant by his statement regarding the thoroughness of the records, which opportunity counsel declined. In view of the narrow fashion in which Bonnelli answered the question, we think this opportunity was sufficient.

We also reject appellant's arguments regarding the Government's alleged failure to comply with its *Brady* obligations. The Government did not decide that it might need to call Ursula McBean as a witness until the trial had nearly begun. Although the Government had not definitely decided by the first day of trial whether to call McBean, it disclosed to defense counsel on the first day of trial that McBean had agreed to a plea bargain. On appellant's request, the Government made a proffer of the conduct upon which McBean's plea bargain was predicated. When appellant requested, after McBean had begun to testify, further materials pertaining to McBean, the Government promptly turned over a substantial number of relevant documents. In view of the Government's last minute decision to call McBean, its production of these materials was sufficiently timely to satisfy its obligations under *Brady*.

Finally, we reject appellant's argument that the Government's cross-examination improperly included questions about "bad acts" not charged in the indictment. The questioning to which appellant objected related to her work as an outside consultant while still employed with the federal government. The thrust of the Government's inquiries on cross-examination was whether appellant had properly sought and received permission to do the outside work, had made the required disclosures about the work and whe

ther she had properly represented her position when contacting other government agencies on behalf of her consulting clients. This was within the permissible scope of cross-examination, as prescribed in the Federal Rules of Evidence. Rule 608(b) prohibits as a general rule use of "extrinsic evidence' 'of "specific instances" of a witness's conduct for the purpose of "attacking or supporting [the witness's] credibility." But specific instances of the witness's conduct may "in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness. . . ." Fed. R. Evid. 608(b). The Government's questions about Watlington's conduct are properly characterized as relating to her character for truthfulness or untruthfulness insofar as they sought to explore whether she had been dishonest in initiating and carrying on her consulting work. *See also* Fed. R. Evid. 611(b) ("[c]ross-examination should be limited to the subject matter of the direct examination *and matters affecting the credibility of the witness")* (emphasis added). The district court did not err in permitting the questioning.

On the basis of the foregoing, we affirm the appellant's conviction.